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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 94

RALPH J. PERK,
County Auditor of Cuyahoga County, Ohio,
Petitioner,

vs.

THE PARK INVESTMENT COMPANY,
and
BOARD OF TAX APPEALS OF THE STATE OF OHIO,
MERRILL D. BROTHERS,
ROBERT E. ZELLAR,
EDWIN F. SAWICKI,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Your petitioner prays that a Writ of Certiorari issue to review the judgment entered by the Supreme Court of Ohio, in an original action in that Court, granting a writ of mandamus commanding the Board of Tax Appeals of the State of Ohio to perform certain functions in regard to tax assessments in Cuyahoga County, Ohio, being Ohio Supreme Court Cause No. 37,357, on the 22nd day of January, 1964, and the order overruling the application for rehearing entered on February 26, 1964.

OPINION BELOW.

The opinion of the Supreme Court of Ohio is officially reported in Volume 175 of Ohio State Reports at page 410 (Appendix A).

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on the 22nd day of January, 1964 (Appendix B). Rehearing was denied on February 26, 1964 (Appendix C). An amended judgment was entered on February 26, 1964 (Appendix D).

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the Federal Constitutional question, 28 U. S. C. A. 1257(3).

QUESTIONS PRESENTED.

1. Does the judgment deny to the homeowners of Cuyahoga County the equal protection of the laws of Ohio, with regard to property owners in the other 87 counties of Ohio?

2. Does the judgment give to the commercial property owners of Cuyahoga County a preferential position not enjoyed by commercial property owners in the remaining 87 counties of Ohio?

3. Was the petitioner granted a fair and impartial trial by the State of Ohio?

4. Is it correct and proper to resort to federal tax stamps on deeds as proof of sales prices of real property?

5. Is it due process of law in Ohio to distinguish among parcels of real property by dividing them into classes according to use?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES OF THE UNITED STATES.

26 U. S. C. 4361:

"There is hereby imposed a tax on each deed, instrument, or writing by which any lands, tenements or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds $100.00, a tax at the rate of 55 cents for each $500.00 or fractional part thereof."

26 U. S. C. 7201:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Article XII—Finance and Taxation.

"2. Taxation by uniform rule; exemption.

"No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. All bonds outstanding on the 1st day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the 1st day of January, 1913 and all bonds issued for the World War Compensation Fund, shall be exempt from taxation, and without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

"Schedule: If the votes for the proposal shall exceed those against it, the amendment shall go into effect January 1, 1934, and existing Section 2 of Article XII of the Constitution of the state of Ohio shall be repealed and annulled; but the following enumerated levies shall not be subject to the limitation of one per cent established by such amendment:

(1) All levies for interest and sinking fund or retirement of bonds issued or authorized prior to said date which are not subject to the present limitation of one and one-half per cent imposed by Section 2 of Article XII and the schedule thereto as approved by the electors of the state on November 5, 1929; (2) All tax levies provided for by the conservancy act of Ohio or the sanitary district act of Ohio, as said laws are in force on January 1, 1934, for the purpose of conservancy districts and sanitary districts organized prior to said date; (3) All tax levies authorized prior to said date by vote of the electors of any political subdivision of the state, pursuant to laws in force at the time of such vote, to be made for or during a period of years extending beyond January 1, 1934, which levies are outside of the present limitation of one and one-half per cent imposed by Section 2 of Article XII and the schedule thereto as approved on November 5, 1929; and (4) All tax levies provided for by the charter of a municipal corporation pursuant to law and which were authorized prior to January 1, 1934, and are not subject to the present limitation of one and one-half per cent imposed by said section and schedule as approved on November 5, 1929. (Adopted Nov. 7, 1933)"

STATUTES OF THE STATE OF OHIO.

R. C. 5703.02. Powers and duties of board of tax appeals.

"The board of tax appeals shall exercise the following powers and perform the following duties of the department of taxation:

(A) Exercise the authority provided by law relative to consenting to the exempting of property from taxation, and revising the list of exempted property in any county except as provided in sections 5709.20 to 5709.26, inclusive, of the Revised Code;

(B) Exercise the authority provided by law relative to determining the date as of which the taxable

deposits in financial institutions shall be listed and assessed;

(C) Exercise the authority provided by law relative to determining whether the real property, and the various classes thereof, in the counties, municipal corporations, and taxing districts have been assessed at the true value thereof in money, and relative to increasing or decreasing the aggregate value of real property in the counties, municipal corporations, and taxing districts;

(D) Exercise the authority provided by law relative to the action of local taxing authorities in levying taxes, collecting and receiving payment of taxes, borrowing money, refunding indebtedness, appropriating money, or expending money;

(E) Exercise the authority provided by law to hear and determine all appeals including appeals from the actions of county budget commissions, decisions of county boards of revision, and actions of any assessing officer or other public official, including appeals from any tax assessments, valuations, determinations, findings, computations, or orders made by the tax commissioner or any correction or redetermination made by him; and hear and determine applications for review of rules of the department of taxation adopted and promulgated by the tax commissioner;

(F) Appoint a secretary of the board of tax appeals, who shall serve in the unclassified civil service at the pleasure of the board, and such other employees as are necessary in the exercise of the powers and the performance of the duties and functions which the board is by law authorized and required to exercise, and prescribe the duties of all such employees, and to fix their compensation as provided by law;

(G) Maintain a journal, which shall be open to public inspection, in which it shall keep a record of

all of the proceedings, the vote of each of its members upon every action taken by it, all investigations undertaken by it or by any of its employees, and of any action taken by it as the result of any such investigation, and where such investigation is followed by a finding of no tax liability or by a remittitur or refund, such finding and the reasons therefor shall be entered in such journal;

(H) Adopt and promulgate in the manner provided by section 5703.14 of the Revised Code all rules of the department of taxation relating to the procedure of the board in administering the laws which it has the authority or duty to administer, and to the procedure of officers or employees of the department whom the board may appoint; provided that sections 4703.11 and 5703.13 of the Revised Code shall apply to and govern the procedure of the board except in so far as such sections conflict with sections 5703.01 to 5703.09, inclusive, 5703.14, and 5703.15 of the Revised Code;

(I) Exercise the authority provided by section 5715.39 of the Revised Code relative to remitting taxes and penalties against real property found to have been illegally assessed or to have been assessed in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of such property for taxation, or the levy or collection of such taxes;

(J) Exercise the authority provided by law relative to approving the appointment or employment of experts, deputies, clerks, and other employees of county auditors or county boards of revision, their compensation and tenure.

In addition to such powers and duties, the board of tax appeals may request the tax commissioner to submit to it reports and recommendations upon matters pertinent to the exercise by the board of the powers and duties vested in it by divisions (A), (B),

(C), and (D) of this section and to conduct such investigations as are necessary in connection therewith." (130 v H 26. Eff. 10-14-63. 128 v 410; 127 v 65; 125 v 903)

R. C. 5703.16. Rules and regulations.

"The department of taxation shall adopt reasonable rules and regulations to govern its proceedings and to regulate the manner of all valuations of real or personal property, apportionments, investigations, inspections and hearings not specifically provided for."

R. C. 5713.01. County auditor shall be assessor; assessment; procedure; employment and compensation of employees.

"Each county shall be the unit for assessing real estate for taxation purposes. The county auditor shall be the assessor of all the real estate in his county for purposes of taxation, but this section does not affect the power conferred upon the tax commissioner as to the valuation and assessment of the property of any public utility.

The auditor shall assess all the real estate situated in the county at its true value in money. The auditor shall view and appraise, or cause to be viewed and appraised, each lot or parcel of real estate and the improvements located thereon at least once in each six year period beginning with the year 1943. When the auditor so views and appraises he may enter each structure located thereon to determine by actual view what improvements have been made therein or additions made thereto since the next preceding valuation. The auditor shall revalue and assess at any time all or any part of the real estate in such county at its true value in money where he finds that the same has changed in value or is not on the tax list at its true value. He may increase or decrease

the value of any lot or parcel of real estate in any township, municipal corporation, or other taxing district by an amount which will place all real property on the tax list at its true value in money, or he may increase or decrease the aggregate value of the real property, or any class of real property, in the county, township, municipal corporation, or other taxing district, or in any ward or other division of a municipal corporation by a percent or amount which will place such property on the tax list at its true value in money so that every class of real property shall be listed and valued for taxation by an equal and uniform rule.

When the auditor determines to assess all the real estate in the county he shall advertise the completion of his reappraisal in a newspaper of general circulation in the county once a week for the three consecutive weeks next preceding the issuance of the tax bills. When the auditor reassesses a class of property or any individual parcels of real estate he shall notify the owner of the real estate, or the person in whose name the same stands charged on the duplicate, by mail or in person, of the changes he has made in the assessments of such property. Such notice shall be given at least thirty days prior to the issuance of the tax bills. Failure to receive notice shall not invalidate any proceeding under this section.

The auditor shall make the necessary abstracts from books of his office containing descriptions of real estate in such county, together with such platbooks and lists of transfers of title to land as the auditor deems necessary in the performance of his duties in valuing such property for taxation. Such abstracts, platbooks, and lists shall be in such form and detail as the commissioner prescribes.

The auditor, with the approval of the board of tax appeals, may appoint and employ such experts, deputies, clerks, or other employees as he deems necessary

to the performance of his duties as assessor; or he may enter into a contract with an individual, partnership, firm, company, or corporation to do all or any part of the work; the amount to be expended in the payment of the compensation of such employees shall be fixed by the board of county commissioners. If in the opinion of the auditor, the board of county commissioners fails to provide a sufficient amount for the compensation of such employees, he may apply to the board of tax appeals for an additional allowance, and the additional amount of compensation allowed by such board shall be certified to the board of county commissioners, and the same shall be final. The salaries and compensation of such experts, deputies, clerks, and employees shall be paid upon the warrant of the auditor out of the general fund of the county; and if the salaries and compensation are, in whole or in part fixed by the board of tax appeals they shall constitute a charge against the county regardless of the amount of money in the county treasury levied or appropriated for such purposes.

Such experts, deputies, clerks, and other employees, in addition to their other duties, shall perform such services as the auditor directs in ascertaining such facts, description, location, character, dimensions of buildings and improvements, and other circumstances reflecting upon the value of real estate as will aid the auditor in fixing its true value. The auditor may also summon and examine any person under oath in respect to any matter pertaining to the value of any real property within the county." (128 v 410. Eff. 11-4-59. 127 v 67; 125 v 903.)

R. R. 5715.01. Assessment of real property; county board of revision.

"The board of tax appeals shall direct and supervise the assessment for taxation of all real property. County auditors shall, under the direction and super-

vision of the board, be the chief assessing officers of their respective counties, and shall list and value the real property within their respective counties for taxation. There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of real property for taxation." (128 v 410. Eff. 11-4-59. 127 v 71.)

R. C. 5715.24. Review of assessment by board of tax appeals; change of aggregate value.

"The board of tax appeals, annually, at a meeting to be held at its office in Columbus on the first Monday in August, or on the date thereafter to which such meeting is adjourned, shall determine whether the real property and the various classes thereof in the several counties, municipal corporations, and taxing districts have been assessed at the true value thereof in money, and if the board finds that the real property or any class thereof in any county, municipal corporation, or taxing district, as reported by the several county auditors to it, is not listed at its true value, the board shall increase or decrease the aggregate value of the real property or any class thereof in any such county, township, municipal corporation, taxing district, or ward or division of a municipal corporation, by a percent or amount which will place such property to be assessed on the tax list at its true value in money so that every class of real property shall be listed and valued for taxation by an equal and uniform rule according to its true value in money." (Eff. 11-4-59.)

R. C. 5715.34. Reassessments upon order of board of tax appeals.

"When a reassessment of all real property, or any class of property, situated in the county, township, municipal corporation, or other taxing district, is ordered by the board of tax appeals, the county auditor shall commence the reassessment in the manner

provided by law, and by rules and regulations prescribed and issued by the board of tax appeals, within sixty days after receiving the order from the board of tax appeals. If the county auditor refuses, neglects or fails to commence such reassessment within sixty days after receiving such order, or refuses, neglects or fails to complete the reassessment within the time limit prescribed and set forth in such order the board of tax appeals shall direct the auditor of state to withhold from such county its share in the distribution of state revenue to local government pursuant to sections 5739.21 and 5739.22 of the Revised Code and to school districts pursuant to Title XXXIII of the Revised Code. The auditor of state shall withhold the distribution of such funds until the board of tax appeals has notified him that such auditor has complied with all of the provisions of this section." (127 v. 74. Eff. 9-9-57. 125 v. 903.)

STATEMENT OF THE CASE.

In a mandamus action originating in the Supreme Court of Ohio, The Park Investment Company, owner of certain commercial real estate in downtown Cleveland, requested, by amended petition, that the Court: 1) make a determination that commercial real property in Cuyahoga County and the City of Cleveland has not been, and is not being, assessed by an equal and uniform rule according to true value in money applicable throughout the State of Ohio, for the years 1953 through 1961, both inclusive; 2) pursuant to such determination and the data compiled by the Board of Tax Appeals, to issue orders to the Auditor of Cuyahoga County in accordance with Article XII, Section 2, of the Ohio Constitution and Section 5715.24 of the Ohio Revised Code and the XIV Amendment of the United States Constitution, decreasing the aggregate values of commercial real property in Cuyahoga

County and the City of Cleveland to effect equalization according to state-wide uniform rule, for the years 1953 through 1961, both inclusive.

The evidence consisted principally of two depositions, one of the deponents being a member of the Board of Tax Appeals and the other being an employee of that Board, together with a number of exhibits, which were largely statistical compilations by the Board of Tax Appeals of estimated sales prices and assessed valuations of real property.

The evidence disclosed that the Board of Tax Appeals, in making its check of sales, did so in the larger counties for only 4 months of each year and, in arriving at "estimated consideration," relied upon the placement of federal tax stamps on deeds as proving sales price.

Using the statistics thus compiled, The Park Investment Company argued that, for the years 1946-1959, the statewide ratio of assessed value to *estimated consideration* (which The Park Investment Company called "sales prices") of all types of real properties sampled was approximately 37%; that the Cuyahoga County ratio for all types of real property for the years 1954-1959 varied from 38% to 41%; that the Cuyahoga County commercial property ratio of assessed values to estimated consideration for 1954-1959 varied from 50% to 58%; that the Cuyahoga County residential property ratio for 1954-1959 varied from 37% to 40%.

The Park Investment Company did not contend in argument to the Supreme Court of Ohio that there was any disparity between the ratios of assessed values to estimated consideration of *commercial property*, as between Cuyahoga County and any other county or as between Cuyahoga County and the statewide ratio for *commercial property* for the years in question.

The Supreme Court of Ohio had before it, as part of the Answer of the Board of Tax Appeals, Ohio Real Property Valuation Rules, adopted and promulgated by the Board of Tax Appeals as "Uniform rules and regulations relating to the valuation of real property in the 88 counties of Ohio for taxation purposes in accordance with the provisions of Sections 5703.02(H), 5703.16, 5715.01 and 5715.34, Revised Code." Among other things, these rules directed the county auditors, in arriving at "true value in money" of real property to consider its availability for the purpose for which it is, or may be used. The rules, likewise among other things, provide that the county auditors shall furnish to the Board of Tax Appeals, an annual abstract of the aggregate assessed value of land and buildings in each taxing district in each of the following five major general types or classes of real property: Residential, Industrial, Commercial, Vacant Lots and Tracts, and Agricultural. In arriving at the true value in money of commercial income producing property, the rules direct each county auditor "to reflect the income factor according to the amount of income produced, or capable of production in his final determination of its true value in money, in any uniform, logical way that he may see fit."

With these items of evidence and the uncontroverted pleading of the rules of the Board of Tax Appeals before it, the Supreme Court of Ohio held in its opinion (Appendix A) that the true value in money of real property is its sales price (inferentially as established by federal tax stamps) and, without any evidence on the subject, held that it has been the practice in the State of Ohio for taxation purposes to establish an assessed value of less than actual value, i.e. to assess property for taxation only for a percentage of the actual value. The Court further held that the assessment percentage must be the same as be-

tween or among the various classes of real property, regardless of its use, whether residential, commercial, or industrial.

Allowing a writ of mandamus, the Court, by its amended entry of February 26, 1964, directed the Board of Tax Appeals "hereafter to perform its statutory duties by reviewing the tax assessments in Cuyahoga County in relation to whether such assessments were made by uniform rule, and, if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments." This order was the same as the original order except that it added the word "hereafter." Although the Amended Petition mentioned only the years 1953 to 1961, inclusive, the Court's judgment ignored those years and directed itself to the future.

THE STAGE, MANNER AND METHOD OF RAISING THE FEDERAL QUESTIONS.

The federal questions were raised in the pleadings in the trial court (the Supreme Court of Ohio) by the amended petition of The Park Investment Company.

The amended petition alleges, in part, as follows: "The data compiled by respondent Board of Tax Appeals conclusively demonstrates that real property in the County of Cuyahoga and the City of Cleveland is not taxed by uniform rule according to value among the various classes thereof such as residential, commercial and industrial property, and that the discrimination heavily burdens commercial property and greatly favors other classes of property. Said discrimination deprives owners of commercial property and relator of property without due process of law, and denies to them the equal protection of the

laws, contrary to the provisions of the Constitution of the United States of America, Amendment XIV." This allegation was denied by the Answer of your petitioner to the Amended Petition.

In its opinion, the Supreme Court of Ohio, although it said that one of the questions in the case "requires an examination of the constitutional and statutory provisions relating to the taxation of real property," thereafter, restricted itself to the Ohio Constitution and did not refer, either directly or indirectly, to the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

1. The judgment of the Supreme Court of Ohio denies to the residential property owners of Cuyahoga County the equal protection of the laws of Ohio with regard to property owners in the other 87 counties of Ohio.

The amended journal entry (Appendix D) directs the Board of Tax Appeals to review tax assessments in *Cuyahoga County* and if it finds discrepancies to direct an order to the (Cuyahoga) county auditor to equalize such assessments. Such an order singles out the residential property owners of Cuyahoga County for a treatment to which the other residential property owners of the state are not subjected.

Figure 8 in the Brief of Relator, which is in the certified transcript of record, discloses that the residential assessed value to sales price ratio in Cuyahoga County is almost identical to the statewide ratio of all properties. It is apparent that, if the commercial property ratio is reduced in Cuyahoga County, the residential property ratio must be increased to produce the same number of tax dollars. It is obvious, then, that the residential property

owners of Cuyahoga County will be suffering from a maladjustment and an inequitable position in regard to property owners in the remainder of the State. The assessed value of residential property in this County would necessarily be considerably higher than the average (not predetermined) resultant 37% statewide ratio for all properties. It is, at best, the substitution of one inequity for another.

2. The judgment gives to the commercial property owners of Cuyahoga County a preferential position not enjoyed by commercial property owners in the remaining 87 counties of Ohio.

As is shown from the certified transcript of record, there was no evidence or argument before the Supreme Court of Ohio to establish that commercial property in Cuyahoga County is assessed at any higher or any different ratio than is commercial property in the other 87 counties of Ohio. In the absence of such evidence, the Court's order making it necessary for the Cuyahoga County auditor to establish the same ratio for residential and commercial property unjustly discriminates in favor of Cuyahoga County commercial property to the disadvantage of Cuyahoga County residential property. No other property in the entire State of Ohio is affected by the judgment. It is unfair to single out Cuyahoga County for distinctive application of the tax assessment laws of Ohio.

3. The petitioner was not granted a fair and impartial trial by the State of Ohio.

The opinion of the court, in the certified transcript of the record (also at 175 O. S. 410, 413), reveals that, without any evidence showing any inequality in the *mode of assessment*, and merely because statistics show a some-

what higher resultant assessed value ratio for commercial property in Cuyahoga County, the Board of Tax Appeals was ordered to direct the auditor of this one county to adjust discrepancies. This was done without one scintilla of evidence disclosing that the Cuyahoga County auditor had set about using any different mode of assessment for commercial property in comparison with any other kind of property.

4. It is incorrect and improper to resort to federal tax stamps on deeds as proof of sales prices of real property.

The amount of Federal Revenue stamps affixed to a deed is no proof whatever of the consideration or the sales price involved in the transaction. The enormity of the error in ascribing verity to sales prices established by Federal Revenue Stamps appears from a recourse to the United States statute which imposes the said excise tax on transfers by deed. The particular section, 26 U. S. C. 4361, also known as Section 4361 of the Internal Revenue Code, has recently been amended and reads as shown in the statutes incorporated herein. However, throughout all of the years in question before the trial court, the said section exempted from the stamp requirement "the value of any lien or encumbrance remaining thereon at the time of sale."

As an illustration, let us take the case of a sale of a property on Cleveland's Public Square for an actual price of $1,000,000. Let us suppose further that there is a tax value thereon at the time of sale of $600,000.00. Let us suppose further that the $1,000,000.00 sale is composed of $600,000.00 cash tendered by the buyer to the seller and the assumption of an existing mortgage in the amount of $400,000.00. Under the clear provisions of 26 U. S. C.

Sec. 4361, the seller or buyer would affix revenue stamps to the deed of transfer based upon $600,000.00, which would be the amount of consideration exclusive of the assumed lien or encumbrance. In such a situation the records would show a tax value of $600,000.00 and a sales price of $600,000.00, in other words tax value as being 100% of sales price. The truth of the matter is that such a sale would be properly shown in any report as having a ratio of 60% of tax value to sales price.

Therefore, any purported statistical study based upon federal revenue stamps as proving the sales price of property, without considering the remaining balance of an assumed mortgage, is worthless.

True enough, the violation of 26 U. S. C. 7201 is a crime, but what constitutes a violation? It is not a violation to place an excessive number of revenue stamps on a deed. The violation lies in evading or defeating the *tax*. (26 U. S. C. 7201.) If a person to whom the tax applies pays the full amount of the tax, the U. S. Government is not concerned because too many stamps are placed on the deed. Neither is there any room for complaint, if the person to whom the tax applies deducts the amount of an assumed mortgage before computing the stamps to be placed on the deed. (26 U. S. C. 4361.)

5. Due process of law in Ohio allows distinctions among parcels of real property by dividing them into classes according to use.

Article XII, Sec. 2 of the Ohio Constitution provides that "land and improvements thereon shall be taxed by uniform rule according to value."

Such a constitutional provision is not self-executing. It needs legislation to carry it into effect. Under that legislation, the Board of Tax Appeals is given the power

to supervise county auditors in making assessments. None of the applicable statutes has been declared unconstitutional by the Supreme Court of Ohio. Likewise, the rules and regulations of the Board of Tax Appeals, dividing real property into five classes according to use has been upheld by the Supreme Court of Ohio. *Carney v. Board*, 169 O. S. 445, decided July 8, 1959.

It is submitted that uniformity of rule, both by reason and decision, comprehends that different kinds of real property necessarily involve different methods and techniques of appraisal. The application of these techniques, although within a uniform rule, may result in some discrepancies of the assessed value-to-market value ratio. This has been recognized by the Supreme Court of Ohio itself. In *Benedict v. Hamilton County Board of Revision*, 170 O. S. 62, a case arising in Cincinnati and decided November 18, 1959, the Ohio Court of last resort, approving a decision of the Board of Tax Appeals which considered the "location and character" of real property, upheld an assessed value for 1957 which was 86% of the actual price for which certain downtown property had been purchased in 1958. Then, on July 10, 1963, the same court, in *Republic Steel Corp. v. Board of Revision of Cuyahoga County*, 175 O. S. 179, upheld, as to certain industrial property, an assessed value which was 44% of reproduction cost new less depreciation.

Classification of real property is permissible under the Federal Constitution. *Union Properties, Inc. vs. Leslie R. Monroe, et al.*, 232 F. 2d 884 (a case arising in Ohio).

CONCLUSION.

For the above reasons, we respectfully submit that this petition for a writ of certiorari be granted.

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio,*

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Attorneys for Petitioner.

APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

THE STATE, EX REL. THE PARK INVESTMENT CO., *v.* BOARD OF TAX APPEALS ET AL.

Taxation—Assessment of real property by uniform rule—Board of Tax Appeals—Duty to review assessments—To order equalization by county auditor.

The Board of Tax Appeals has a statutory duty to review the tax assessments in any county in relation to whether such assessments were made by uniform rule and, if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order to the county auditor as is necessary to equalize such assessments.

(No. 37357—Decided January 22, 1964.)

IN MANDAMUS.

This is an action in mandamus originating in this Court. Relator seeks an order directing the Board of Tax Appeals to make a determination that the real property in Cuyahoga County has not been and is not being assessed by an equal and uniform rule according to true value in money and directing the Board of Tax Appeals to issue orders to the Auditor of Cuyahoga County to decrease the aggregate assessed value of "commercial" real property in Cuyahoga County.

Relator bases its right to relief on statistical records of real estate transactions in every county of the state, compiled by the Board of Tax Appeals, which admittedly show that "commercial" real estate in Cuyahoga County, has a higher assessed valuation in relation to sales price than real estate in other classifications, and real estate generally without breakdown as to classification. These

records do not include sales under $1,500; sales from or to a city or county or other political subdivision; forced sales of any kind; and sales where a relationship between seller and buyer is determined.

The Board of Tax Appeals, hereinafter referred to as respondent, contends that relator has shown no right to relief since sales price is only a single factor in the determination of real estate value, and, standing alone, it is not conclusive of true value.

Messrs. Rager, Forrester, Kovanda & Lord, for relator.

Mr. William B. Saxbe, attorney general, and *Mr. Daronne R. Tate,* for respondent Board of Tax Appeals.

Mr. John T. Corrigan, prosecuting attorney, *Mr. A. M. Braun, Mr. George W. Leddon* and *Mr. John L. Dowling,* for respondent Ralph J. Perk, Auditor of Cuyahoga County.

MATTHIAS, J. Two basic questions are raised in this case. First, is the market value of real property the basis upon which true value is determined for the purpose of tax assessment? Second, where it is apparent that real property in the various classes and counties are being assessed on different percentages of value, is there a duty on the Board of Tax Appeals to order the county auditors to equalize such assessments?

The determination of the first of these questions requires an examination of the constitutional and statutory provisions relating to the taxation of real property.

The criterion for the assessment and taxation of real property is set forth in Section 2, Article XII of the Ohio Constitution, and Section 5713.01, Revised Code.

Section 2, Article XII of the Constitution, provides:

> "Land and improvements thereon shall be taxed by uniform rule according to value."

Section 5713.01, Revised Code, provides:

"The auditor shall assess all the real estate situated in the county at its true value in money."

There is no provision in the Constitution for a classification of real property according to use, rather the rule is that all real property must be taxed according to its value.

It is clear that under the Ohio law all real property, regardless of its nature or use, may be assessed and taxed only by a uniform rule on the basis of value.

Thus, the determinative issue is: What is the value or true value in money of real property?

In the last analysis the value or true value in money of any property is the amount for which that property would sell on the open market by a willing seller to a willing buyer. In essence, the value of property is the amount of money for which it may be exchanged, *i.e.*, the sales price.

Respondent urges that the sales price is only one of many things which must be taken into account in determining value.

The confusion in the area of valuation arises from a failure to differentiate between the ultimate result which is sought to be attained, namely, the value of the property in question, and the methods which may be used to determine such value in the absence of an actual sale.

The best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. Paragraph two of the syllabus in *In re Estate of Sears*, 172 Ohio St., 443, 178 N. E. (2d), 240. This, without question, will usually determine the monetary value of the property. However, such information is not usually

available, and thus an appraisal becomes necessary. It is in this appraisal that the various methods of evaluation, such as income yield or reproduction cost, come into action. Yet, no matter what method of evaluation is used, the ultimate result of such an appraisal must be to determine the amount which such property should bring if sold on the open market.

Therefore, the value, or true value in money of property for the purpose of taxation, is that amount which should result from a sale of such property on the open market. The board, in compiling the sales prices, refined them in order to more closely approximate true market value. All forced sales, sales from or to a political subdivision and sales between related persons were excluded.

This brings us to a consideration of a question which is ancillary to the question of value. It is and has been the practice in this state for taxation purposes to establish an assessed value of less than actual value, in other words, to assess property for taxation only for a percentage of the actual value. This raises the question of uniformity. Taxation by uniform rule within the requirement of the constitutional provision requires uniformity in the mode of assessment. Thus, inasmuch as property is not assessed on the basis of full value, the percentage of such value which is the basis of taxation or, in other words, the tax basis must be relatively uniform not only throughout the state but also as to the various classes of real property. As pointed out above, there is no constitutional authorization for classification of real property for taxation in relation to its nature or use. All property, whether commercial, residential or vacant, must be assessed on the basis of the same uniform percentage of actual value.

Thus, if the ratio between sales price and assessed value in general differs to any appreciable extent, either

throughout the state as a whole or as to various classes of property in particular, then property is not being taxed by uniform rule as required by Section 2, Article XII of the Ohio Constitution.

The second problem raised by this case is the duty of the Board of Tax Appeals when such condition exists.

Under the provisions of Section 5715.24, Revised Code, the Board of Tax Appeals is made the board of equalization for the state, with the duty of supervising the assessment of real property in order to ensure that every class of real property is listed and valued for taxation by an equal and uniform rule at its true value in money. Under this section, if an inequality exists it is the board's duty to so determine and, under Section 5715.25, Revised Code, to direct the county auditor to adjust the assessments so that the assessments are by uniform rule.

The equalization itself is a matter for the attention of the Board of Tax Appeals upon a proper presentation of evidence.

The board, therefore, is directed to perform its statutory duties by reviewing the tax assessments in Cuyahoga County in relation to whether such assessments were made by uniform rule and, if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments. The writ of mandamus is allowed.

Writ allowed.

TAFT, C. J., O'NEILL and HERBERT, JJ., concur.

ZIMMERMAN and GRIFFITH, JJ., concur in the syllabus.

GIBSON, J., dissents.

GIBSON, J., dissenting. In the absence of evidence to the contrary, it is generally assumed that an administrative agency, such as the Board of Tax Appeals, has acted, is acting and will continue to act in compliance with the statutes and laws of this state. 1 Ohio Jurisprudence (2d), 607, Administrative Law and Procedure, Section 216; 42 American Jurisprudence, 680, Public Administrative Law, Section 240. I, therefore, fail to comprehend what this court expects to accomplish by a mandate requiring the board to perform its statutory duties. To issue a writ to compel the board generally to observe its statutory duties, without a finding that the board did not and will not observe such duties, appears to be a mere duplication of the command of the General Assembly in the applicable statutes. 35 Ohio Jurisprudence (2d), 263, Mandamus, Section 17.

Although the court refers to certain statistical data possessed by the board, which allegedly show that real property of various classes in various counties of the state and in Cuyahoga County has been assessed unequally, it does not state whether such data are reliable or sufficient to show discrimination. In fact, the court in its syllabus and the concluding paragraph of the opinion clearly indicates that the board must find "discrepancies" in the tax assessment before it is to direct such an order "as is necessary" to the county auditor to equalize assessments.

The statistical data, to which reference is made, apparently were gathered by a small number of board employees for the years 1946 through 1959, in the following manner:

1. In the larger counties during four months out of the year every recorded sale of real estate was checked. In the smaller counties all recorded sales during the year were checked.

2. Sales of under $1,500 were excluded.

3. Sales from or to a city, county or other political subdivision or forced sales of any kind were excluded.

4. Where a family relationship existed between the buyer and seller, the sales were excluded.

5. *The sales price was determined by the amount of revenue stamps on the deed.* Deeds were also checked for any mortgages which continue.

Since 1954, the board's requirement that the annual abstracts submitted by county auditors be segregated to show the various classes of real property has supplied the board with additional statistical information.

Without a detailed analysis of the statistical data, it is apparent that such do not constitute a valid method of ascertaining value of property. It is common knowledge that in many counties the relationship between the price paid and the amount of revenue stamps affixed is theoretical only. Even if it is assumed that all vendors affix not less than the statutorily required revenue stamps, there is nothing to prevent a vendor from affixing more stamps than required. A sample of real estate transactions consummated during one-third of the year is of doubtful statistical validity. Further, the law has long recognized that each piece of real estate is unique, and that no two pieces of realty are the same in location, quality, or value.

Before the court, in this action in mandamus originating here, finds that the board has failed to perform its clear legal duty, it surely should find on the basis of the evidence presented that there has been a discriminatory assessment of relator's property. See *Rollman & Sons Co. v. Board of Revision of Hamilton County* (1955), 163 Ohio St., 363. In view of the unreliable character of the statistical data presented, this would appear to be impossible to do.

Certain language used by the court in rationalizing its order to the board to obey the law will, in my opinion, cause endless difficulties. The effect of the majority opinion is to substitute "sales price" or "market value" for the constitutional and statutory standards of "value" and "true value in money." On its face, a rule that the meaning of "value" (as used in Section 2, Article XII, Ohio Constitution) or "true value in money" (as used in Chapter 5713, Revised Code) is only the amount of money for which property may be exchanged, *i. e.*, the sales price, seems to have the elusive virtue of simplicity. But, as is so often true, the social, economic and political nuances of the problem presented here are neither simple nor subject to simple solution.

Neither the Constitution nor the statutes fix any method for the valuation of property. The Constitution requires only that land and improvements thereon shall be taxed "by uniform rule according to value," and the statutes provide for separate listing of the land and the buildings thereon at their "true value in money." This court in a series of cases has considered a number of methods of valuing real estate for tax purposes.

In *State, ex rel., v. Jones, Aud.* (1894), 51 Ohio St., 492, 505, this court, in finding that goodwill of a business establishment tends to increase the earning capacity of the property and hence its value, noted that "taxation by a uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property, without regard to any classification." This court, in considering the various elements making up "true value in money," stated the law in the third paragraph of the syllabus of *State, ex rel., v. Halliday* (1899), 61 Ohio St., 352, as follows:

"In ascertaining the true value in money of such [personal] property in the hands of its owner, every fact or circumstance, brought to the attention of the person or officer who is charged with the duty of fixing that value, and which in its nature bears on the question, should be considered by him. One of those circumstances is the earnings or rental of such article."

The brief of the Board of Revision in *American Steel & Wire Co. of New Jersey v. Board of Revision of Cuyahoga County* (1942), 139 Ohio St., 388, suggested that there were three methods of valuing real estate, viz., (1) reproduction cost less depreciation or "physical," (2) comparative sales or "market," and (3) "economic" or capitalized income. In discussing these methods of valuing property for tax purposes, this court, at page 391, said:

"With respect to these methods, it should be observed that, *while reproduction cost, depreciation, opinions as to market value, and income may be given proper consideration, true value is a question of fact to be determined by the taxing authorities. It does not appear from the record that the Board of Tax Appeals applied any particular method exclusively but merely determined the true value of the buildings on each parcel from all the evidence. This course was in conformity to law.*

"A great deal is said by the board of revision about uniformity; but it should be remembered that the fixing of the true value of each lot or tract with improvements thereon is a separate proceeding and does not involve the consideration of all the parcels of land within a given area at the same time. *When determinations as to the true value are reached by the taxing authorities as to each tract or lot of land and improvements thereon throughout a taxing district, though in separate inquiries or proceedings, taxation based upon valuations so*

fixed is essentially by uniform rule within the meaning of the Constitution and statutes. In other words if the true value of each parcel of real estate is fixed separately then there is such uniformity between all parcels as is required by law.]' (Emphasis supplied.)

The unanimous court, continuing to discuss true value in money, stated, at page 392:

> "*In determining the value of land or the improvements thereon all the facts and circumstances relating to the nature of the property, its availability for the purpose for which it was constructed or for any other purpose for which it may be used, its obsolete character, if such it has, and every other factor that tends to prove the true value in money of the land and the improvements thereon, and evidence of facts occurring after as well as before the tax lien day of the year involved within reasonable limitations are admissible.*" (Emphasis supplied.)

This opinion by the court is squarely contrary to its opinion in *Ramsey v. Board of Revision of Franklin County* (1943), 141 Ohio St., 366, where it is said that sale price is not the controlling factor, but, if the sale is voluntary, it is only one factor. The sale price of the property there was $3,000, yet the assessed true value in money of $7,500, as found by the Board of Tax Appeals, was held not unlawful or unreasonable. See, also, *B. F. Keith Columbus Co. v. Board of Revision of Franklin County* (1947), 148 Ohio St., 253, where it is said that, in determining the value of property for the purpose of taxation, the assessing body must take into consideration all factors, including functional depreciation, which affect the value of the property.

It is also relevant to note that the Board of Tax Appeals, acting pursuant to statutory authority, has promul-

gated uniform rules and regulations relating to the valuation of real property in the 88 counties. According to such rules, property is classed as (1) residential, (2) industrial, (3) commercial, (4) agricultural, and (5) vacant lots and tracts. "True value in money" of the various classes of real property is defined in such rules and regulations as "the value to be determined, in the first instance, by the county auditor as the assessor of real property in his county on consideration of all the facts relating to the physical nature and construction of the property, its availability for the purpose for which it was acquired or constructed, or for the purpose for which it is, or may be, used, and every other applicable factor which may tend to indicate the value of the property such as actual cost, value as indicated by reproduction cost, physical and functional depreciation and obsolescence, if any, market value, and the income capacity of the property, if any. The assessor shall likewise take into consideration the location of the property and the valuations of similar properties in the same locality." There is no suggestion by relator that these rules and regulations are the result of an unreasonable or unlawful exercise of the rule-making power of the Board of Tax Appeals. The absence of such a suggestion is understandable in view of the fact that they were found not to be unreasonable or unlawful in *Carney, Aud., v. Board of Tax Appeals* (1959), 169 Ohio St., 445.

Still another reason exists for denying the writ in this case. For each and every taxable year since 1954, the county auditors have made out and transmitted to the Board of Tax Appeals abstracts of all the real property in the taxing districts of the counties, in which have been set forth the aggregate amount and valuation of each class of real property in such counties and in each taxing district. In each of such years, the board, acting pursuant to

Section 5715.24, Revised Code, has determined that the various classes of real property in the several counties, municipal corporations and taxing districts have been assessed at true value in money for the years in which Section 5715.24 required assessment at "true value thereof in money" and at "taxable value" for the years in which Section 5715.24 has required assessment at taxable value. There is not now pending before the Board of Tax Appeals an abstract of the real property of Cuyahoga County for the consideration and approval of the board under the provisions of Section 5715.24, Revised Code.

For the foregoing reasons, in my opinion, the writ should be denied in the instant case.

APPENDIX B.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered January 22, 1964.)

This cause was considered by the Court on the petition, answers, depositions, exhibits, briefs and was argued by counsel. On consideration whereof, it is ordered by the Court that, for the reasons set forth in the opinion rendered in this case, the writ of mandamus is allowed and the board is directed to perform its statutory duties by reviewing the tax assessments in Cuyahoga County in relation to whether such assessments were made by uniform rule and, if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments.

APPENDIX C.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(Entered February 26, 1964.)

It is ordered by the Court that rehearing in this case is denied.

APPENDIX D.

AMENDED JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered February 26, 1964.)

This cause was considered by the Court on the petition, answers, depositions, exhibits, briefs and was argued by counsel. On consideration whereof, it is ordered by the Court that, for the reasons set forth in the opinion rendered in this case, the writ of mandamus is allowed and the board is directed hereafter to perform its statutory duties by reviewing the tax assessments in Cuyahoga County in relation to whether such assessments were made by uniform rule and, if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~1124.~~ 94

RALPH J. PERK,
County Auditor of Cuyahoga County, Ohio,
Petitioner,

vs.

THE PARK INVESTMENT COMPANY,
and
BOARD OF TAX APPEALS OF THE STATE OF OHIO,
MERRILL D. BROTHERS,
ROBERT E. ZELLAR,
EDWIN F. SAWICKI,
Respondents.

BRIEF OF RESPONDENT, THE PARK INVESTMENT COMPANY, In Opposition to Petition for Writ of Certiorari.

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BRIEF OF RESPONDENT, THE PARK INVESTMENT COMPANY, In Opposition to Petition for Writ of Certiorari.

ADDITIONS TO STATEMENT OF THE CASE.

Petitioner omitted some s. lient facts from its Statement of the Case which this Respondent wishes to bring to the attention of this Court.

(1) All of the evidence presented before the Supreme Court of Ohio, excluding only the "Uniform Rules and Regulations" promulgated by the Board of Tax Appeals which were appended to its Answer, was produced by this Respondent. Neither the Petitioner here nor the other Respondents chose to adduce any further evidence to demonstrate that this Respondent's contentions were erroneous. In such a posture, Respondent believes it must

be concluded that this Respondent clearly and conclusively proved its case.

(2) Petitioner's Statement of the Case implies that the statistics of the Board of Tax Appeals which were compiled over a period of years were insubstantial. Actually, the study included 1,182,346 individual sales involving consideration of $13,188,735,007.00 and assessed valuation of $4,894,603,440.00. The four months' check in the larger counties annually covered the most active months so far as real estate transfers are concerned and comprehended *every* transfer during that period. In all other counties all sales were checked.

ARGUMENT.

(1) The Order of the Supreme Court of Ohio does not deny residential property owners of Cuyahoga County equal protection of the laws of Ohio.

Petitioner's first argument, in effect, is that while discrimination does exist as to commercial property, this discrimination should be permitted to exist because *one way* to equalize (suggested by Petitioner) would be to raise the level of residential property assessments above the statewide average to produce the same tax dollars in Cuyahoga County. The amount of tax revenue is not in issue in this case and in any event is determined within statutory limitations by governmental agencies and outside such limitations by the electorate. The Ohio Supreme Court did not order the residential property ratio increased; it did order the Ohio Board of Tax Appeals "that if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments." The Court's order was directed to end

discrimination. Petitioner is assuming that the Board of Tax Appeals will perpetuate discrimination.

From the Court's order it is clear that the residential ratio need not be increased; only that all classes be equalized as to the assessment ratio. Such equalization could result in an increased tax rate, but an increased rate on the basis of equalized assessments can in no sense be denominated discrimination against any group.

(2) The judgment does not give Cuyahoga County commercial property owners a preferential position.

The second argument offered by the Petitioner claims that under the order of the Ohio Supreme Court, the commercial class in Cuyahoga County would have a preferential position over the commercial property owners in the remaining counties of the State.

Again, this argument admits the discrimination extant in Cuyahoga County, but contends that correction of the Cuyahoga County maladjustment would afford commercial property owners in Cuyahoga County equalization and fulfillment of constitutional rights not enjoyed in the rest of the State. This resembles the argument of a man charged with speeding who contends he should not be convicted unless all speeders are similarly convicted.

The order of the Supreme Court of Ohio is directed to the Board of Tax Appeals, the supervisor of all auditors in the State, to "direct such an order as is necessary to the county auditor to equalize such assessments." The argument of the Petitioner is that the Board of Tax Appeals will issue an order which will not carry out the Court's mandate. Such an argument is, of course, bottomed on speciousness. It cannot be presumed that the Board of Tax Appeals will subvert the order of the Ohio

Supreme Court. To the contrary, it is well established law that a public official or body will be presumed to carry out its duties. 42 *American Jurisprudence* 680, Public Administrative Law, Section 240.

The Petitioner studiously avoids reference in his brief to the requirement of Article XII, Section 2 of the Ohio Constitution that "Land and improvements thereon shall be taxed by uniform rule according to value." The quoted sentence is the very essence of the order of the Ohio Supreme Court. The evidence, as summarized in the charts contained in this Respondent's brief, displayed without the slightest contradiction, that discrimination against commercial property; contrary to the provisions of Article XII, Section 2, existed in monumental proportions in Cuyahoga County. The Court's order is clearly and concisely directed to carry out the mandate of the Ohio Constitution.

(3) A fair trial was had.

The evidence proved beyond the peradventure of a doubt, and, in fact, without any attempt on the part of Petitioner or the other Respondents to demonstrate otherwise, that commercial property in Cuyahoga County was being assessed on a basis at least 36% higher than residential property. More than one-third higher is what Petitioner euphemistically refers to in his brief as "somewhat higher resultant assessed value ratio for commercial property in Cuyahoga County" (p. 18 Petitioner's brief). It would seem a permissible judicial inference from such a state of facts that something was awry in the assessor's (auditor's) office.

Petitioner chose not to introduce any evidence of his own. The Court did not foreclose this opportunity. In

view of Petitioner's own decision it can hardly be said he did not have a fair and impartial trial. Petitioner did not even dispute the evidence offered. The evidence itself consisted almost entirely of official studies of the Respondent Board of Tax Appeals.

The Ohio Supreme Court emphatically stated that value means market value. Consequently, no matter what method, or mode as suggested by Petitioner, is used to ascertain market value, the result, that is, the ascertainment of market value, is the sole objective. The method or mode is not sacrosanct. Modes which produce variations of over one-third between classes (as was demonstrated here) have obviously not produced the desired result—uniformity.

(4) The evidence submitted was properly admitted.

Edwin Ducey, Chief of the Division of County Affairs of the Respondent Board of Tax Appeals, through whom most of the exhibits were offered into evidence, testified that the deeds, which were reviewed in connection with the Board's Herculean statistical survey, were checked for continuing mortgages and encumbrances, and these were taken into consideration in determining sales prices. Thus, the example of the Petitioner (pp. 18-19 of Petitioner's brief) is completely without foundation, and his argument evaporates. Petitioner has failed, apparently, to comprehend Mr. Ducey's testimony as to the many checks and safeguards adopted to realize a remarkably large and accurate survey.

Petitioner also fails to acknowledge that *not one* sale was shown to be inaccurate. For each sale a card was made on which was compiled substantial information regarding the property involved. There was not the slightest showing by Petitioner or any other Respondent that

any of the information on these cards was in the slightest degree inaccurate or erroneous. Petitioner has laid no basis for complaint.

Furthermore, the question of what the Ohio Supreme Court should admit as evidence is not a federal question even though the evidence results from compliance with federal law.

Finally, such evidence has been generally treated as at least prima facie evidence of sales price. 51 *A. L. R.* 2d, 1004.

(5) The Ohio Supreme Court is the interpreter of the Ohio Constitution.

Whether or not classification of real property is permissible under the Federal Constitution is *not* in issue. In this case the Ohio Supreme Court has interpreted the Ohio Constitution to require that all classes of real property must be assessed and taxed only by uniform rule on the basis of value. The Court further held that value is market value, and that all methods of appraisement have as their primary objective the ascertainment of market value.

It would appear from Petitioner's brief that this Court is being asked to construe the Ohio Constitution, not by reason of any mandate of the Federal Constitution, but merely through Respondent's urging of another construction of the Ohio Constitution. It needs no citation of authority to establish that this Court does accept as final the construction of the Ohio Constitution given to it by the Ohio Supreme Court. This Court does not act as an appellate court to construe the Ohio Constitution when there is no claim that the State Constitution abrogates a right secured by the Federal Constitution. Petitioner has made no such claim here. The fact that a Federal Appellate Court, in the absence of an authoritative decision of the

Ohio Supreme Court, had employed a different construction of the Ohio Constitution (which the Appellate Court did not do in the case cited by Petitioner) would not in the least bind the Ohio Supreme Court in a later case. In fact, in many cases, the Federal Court has held an action in abeyance pending proceedings in the State Courts to obtain an authoritative decision of the highest State Court.

CONCLUSION.

Petitioner correctly stated on page 16 of its brief that the Ohio Supreme Court did not refer, either directly or indirectly, to the Fourteenth Amendment to the Constitution of the United States. Without determining any application of the Fourteenth Amendment, the Ohio Supreme Court construed Article XII, Section 2 of the Ohio Constitution to require the issuance of a mandamus to the Board of Tax Appeals to carry out the equalization duties specially enjoined upon it under Revised Code of Ohio Section 5715.24.

Petitioner in his brief fails to give a clue as to how he believes the Ohio Court order violated the Fourteenth Amendment. The Fourteenth Amendment, by various theories, incorporation, absorption and otherwise, has drawn the Bill of Rights into operation as to the actions of the States so far as the individual's rights as opposed to the State are concerned. However, the Fourteenth Amendment is inapplicable as to one arm of the State as opposed to another. Petitioner here is a party in his official capacity as County Auditor, an officer of a political subdivision of the State. Thus, the penumbra of the Fourteenth Amendment does not reach this relationship.

The only possible question properly raised by Petitioner thus relates to the use of federal revenue stamps as evidence of sales price. But this is a question of procedural

or adjective, not substantive, law. The State determines with finality its own rules of evidence. No substantive application of the Federal statutes is involved.

No cognizable question has been raised and the Petition should be overruled.

Respectfully submitted,

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The Park Investment Company.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 974

RALPH J. PERK,
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MERRILL D. BROTHERS,
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EDWIN F. SAWICKI,
Respondents.

BRIEF OF AMICUS CURIAE THE CLEVELAND ASSOCIATION OF BUILDING OWNERS AND MANAGERS

In Opposition to Petition for Writ of Certiorari.

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Constitutions.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1124.

RALPH J. PERK,
County Auditor of Cuyahoga County, Ohio,
Petitioner,

vs.

THE PARK INVESTMENT COMPANY,
and
BOARD OF TAX APPEALS OF THE STATE OF OHIO,
MERRILL D. BROTHERS,
ROBERT E. ZELLAR,
EDWIN F. SAWICKI,
Respondents.

BRIEF OF AMICUS CURIAE THE CLEVELAND ASSOCIATION OF BUILDING OWNERS AND MANAGERS

In Opposition to Petition for Writ of Certiorari.

INTRODUCTION.

1. The Cleveland Association of Building Owners and Managers has about sixty member buildings in downtown Cleveland, and thus represents the Owners and Managers of approximately $250,000,000 worth of commercial and office building properties located in and about downtown Cleveland.

The membership of this Association therefore comprises a *class* whose interests in the issues and principles involved in this lawsuit are common and identical with those of the respondent taxpayer.

2. This Association desires to present a point not discussed in the briefs heretofore filed herein.

3. This point is that this lawsuit lacks some elements that are essential requirements for Federal consideration, to wit:

A. No Federal question was decided by the State Court.

B. No Federal question is now presented to this Court.

C. On the merits, the Petitioner does not make a case.

4. This Association adopts, without repeating, the statement of facts and arguments of law that are set forth in Respondent's brief.

ADDITIONAL STATEMENT OF THE CASE.

1. The Ohio Constitution deals simply, plainly and briefly with the subject of taxation of real property. It merely provides:

> "Land and improvements thereon shall be taxed by uniform rules according to value." Art. XII, Sec. 2.

2. The undisputed evidence shows that the practice of the Ohio taxing authorities, now and for many years past, has been to classify real property according to use (not value), as follows:

Commercial Property Classification
Residential Property Classification
Industrial Property Classification
Agricultural Property Classification

The evidence gives ratios of assessed values to sales prices for the various classifications, both for Cuyahoga County and also on a statewide basis. The results are compelling.

Area	*Use*	*Ratio of Assessed Values to Sales Prices*
Statewide	All types	37%
Cuyahoga County	All types	38% to 41%
Cuyahoga County	Commercial	50% to 58%
Cuyahoga County	Residential	37% to 40%
Cuyahoga County	Vacant Land	37% to 44%

This shows commercial property in Cuyahoga County about 36% above the statewide average, and 40% above the Cuyahoga County residential average. The discrimination is too large to avoid; it must be faced. These percentages are, of course, approximate averages. They are made from statistics, with special cases eliminated, col-

lected by the Respondent the State Board of Tax Appeals, and involving over 1,100,000 sales of properties with total prices over $13,100,000,000.00 and total assessed values of over $4,800,000,000.00.

3. The Amended Petition below complained that the practice above described violates and ignores the above quoted command of the Ohio Constitution for taxation of land "by uniform rule according to value," and that the discrimination "heavily burdens commercial property and greatly favors other classes of property," thus depriving the owners of commercial property of their property right "without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Constitution of the United States of America, Amendment XIV."

4. After hearing the case, the State Court's mandate directed the taxing authority,

> "to perform its statutory duties by reviewing the tax assessments in Cuyahoga County in relation to whether such assessments were made by uniform rule and, if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments."

5. The Federal Constitution was not mentioned by the State Court anywhere—not in the mandate, and not in the opinion.

ARGUMENT.

This lawsuit lacks some elements which are essential to Federal jurisdiction. Without them, the petition must fail.

A. No Federal Question Was Decided by the State Court.

Certiorari is here available, if at all, only if some "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States." 28 U. S. C. A. 1257(3). See *Palmer Oil Corporation vs. Amerada Corporation*, 343 U. S. 390; *Michel vs. Louisiana*, 350 U. S. 91, 97; *Raley vs. Ohio*, 360 U. S. 423, 436.

Petitioner made no such claim. He made no reference whatever to the Federal Constitution. Although the taxpayer-Respondent did make such a claim, the State Court decided the case in such a way that that claim never was reached for consideration. Thus, Petitioner has no Federal claim of his own, and can not use the Federal claim which the taxpayer unsuccessfully asserted. A person cannot invoke the jurisdiction of this Court to vindicate the Federal right of another whether or not a party to the litigation. *Hanson vs. Denckla*, 357 U. S. 235, 244 and cases there cited. The case went off on other grounds, and they were not Federal grounds.

Had the State Court sustained the present practice, it would then have been faced with the Constitutional question, and would have been obliged to try to justify the present practice under the equal protection clauses of the Fourteenth Amendment to the Federal Constitution and of Article I of the Ohio Constitution.

However, the State Court rejected the present practice, interpreted the State Constitution to require uni-

formity, and ordered strict compliance therewith. Thus no problem of equal protection arose and no Federal question was ever reached, considered or decided.

B. No Federal Question Is Now Presented to This Court.

For the reasons stated above, no Federal question is now presented to this Court. Petitioner made in the State Court no claim under the Fourteenth Amendment, and the State Court issued its mandate for compliance with the literal language of the Ohio Constitution, so that the taxpayer-Respondent's claim for equal protection under the Fourteenth Amendment never came up for consideration there, and therefore is not available to supply Petitioner with a Federal question here.

C. On the Merits, the Petitioner Does Not Make a Case.

At the trial, the taxing authorities offered no evidence except the rules of the Respondent, the State Board of Tax Appeals, attached to its answer; and those were thus admitted in evidence. No evidence was excluded.

The taxpayer made its case by statistics collected by the Respondent itself, the State Board of Tax Appeals, and by examination of the Board's own employees as witnesses. These statistics made an overwhelming case of discrimination (special cases had been eliminated in compiling them).

The Board and the petitioner made their defense by claiming that the the taxpayer's evidence, taken from the Board's own records, was insufficient to prove discrimination, and by asserting that the state statutes permit discrimination in spite of the plain constitutional prohibition of discrimination. The State Supreme Court vigorously rejected both of those contentions.

The petitioner attacks that result by claiming, now and for the first time asserting the Federal Constitution, a strange contention that new discrimination would result from abolishing the discrimination he now defends. This involution resembles the plea of the young man who had murdered his father, and then sought mercy on the ground that he was an orphan.

This curious argument suggests in effect that the State Court's judgment creates a new discrimination by allegedly denying to the residential property owners of Cuyahoga County privileges enjoyed by owners in the other 87 counties of Ohio, and by allegedly giving to the commercial property owners of Cuyahoga County a preferential position not enjoyed by commercial property owners in the remaining 87 counties of Ohio—in other words, that the abolition of discrimination within the county creates discrimination without the county.

In the first place, this argument assumes that taxing authorities in the other counties would fail to apply the principles established by the State Court's judgment here. However, the legal presumption is that officials will do their duty and not ignore it. *Muser vs. Magone*, 155 U. S. 240, 251; *U. S. vs. Chemical Foundation*, 272 U. S. 1, 14.

In the second place, Petitioner made no such claim in his pleadings, or anywhere in the Court below. Novel in this Court is his newly found reliance upon the Constitution as forbidding a judgment against him because it would allegedly create discriminations in relation to property owners outside of Cuyahoga County. A question not properly raised, litigated, or passed upon in the courts below will not be considered in the Supreme Court upon certiorari. *Delgadillo vs. Carmichael*, 332 U. S. 388, 391; *McCullough vs. Kammerer Corporation*, 323 U. S. 327;

Chicago, St. P., M. & O. R. Co. vs. United States, 322 U. S. 1, 4.

In the third place, the argument has a queer inconsistency. Is the petitioner *for* discrimination within his county, and *against* discrimination outside his county? Is the petitioner *for* discrimination generally, or is he *against* discrimination?

And all this comes in the face of a plain Constitutional provision that:

> "Land and improvements thereon shall be taxed by uniform rule according to value."

The petition should be denied.

Respectfully submitted,

J. HALL KELLOGG,

Attorney for
The Cleveland Association of Building Owners and Managers, Amicus Curiae.